

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

JAMES A. WILSON, <i>et al.</i> ,	:	C.A. No. S10M-04-025 THG
Plaintiffs,	:	
v.	:	
CARL DANBERG, <i>et al.</i> ,	:	
Defendants.	:	

ORDER ON MOTION TO DISMISS

1) James Wilson, Norman Miller, Barry Dixon, Sam Jones, Ronell Morris, Jamah Grosvenor, Andr’ae Manuel and Bryan Evans have filed a complaint against the following defendants in both their individual and official capacities: Department of Correction (“DOC”) Commissioner Carl Danberg; Mike DeLoy, former Warden at Sussex Correctional Institution; Attorney General Beau Biden; DOC Sergeant Barry Biles; C.O. L. Muniz; C.O. Tim West; St/L West; C.O. Curt Rogers; and C.O. Martin Burton.

2) The complaint contains the following.

a) Plaintiffs are incarcerated at Sussex Correctional Institution (“SCI”). [An amended pleading by James Wilson indicates that he has been transferred to Howard R. Young Correctional Institution. The defendants have indicated that plaintiff Barry Dixon now is housed at Sussex Community Corrections Center.]

b) Plaintiffs allege they filed a universal grievance and petition after they allegedly

witnessed Sergeant Biles, C.O. Muniz and C.O. Rogers assault Usef Dickerson on or about November 11, 2009. No charges were filed in connection with the alleged assault. Plaintiffs asked Attorney General Beau Biden, Commissioner Carl Danberg, and then Warden Mike DeLoy to protect them from retaliation and harassment from the correctional officers. They did not receive any assistance or response to their request. They also filed grievances requesting that Commissioner Danberg and then Warden DeLoy file intimidation of witness charges, retaliation charges, and harassment charges against Sergeant Biles, C.O. Muniz, C.O. West and C.O. Burton. These defendants took no action and C.O. Tim West returned the grievances as non-grievable.

c) The harms plaintiffs claim they suffered were as follows:

Plaintiffs received looks of intimidation from defendants Sgt. B. Biles; C/O T. West; C/O L. Muniz and C/O M. Burton on a regular basis. They refused to take plaintiffs [sic] mail; made statements that more of this was going to happen because of the paper that was filed. Defendants walked up and down the tier with chest out looking at plaintiffs; questioning plaintiffs as to why they signed the petition, grievance; religious views; searching plaintiffs more than usually [sic] and moved plaintiffs Wilson, and Manuel to C and D tier because the word was they was [sic] the leaders in the construction of the petition and grievance. ... Plaintiffs is [sic] surrounded by this energy 5 days a week from these officers.

d) Plaintiffs further allege the actions of these DOC employees constitute intimidation of witnesses, in violation of 11 *Del. C.* §§ 3532¹ and 3533.² Plaintiffs assert the Court must protect

¹In 11 *Del. C.* § 3532, it is provided as follows:

Except as provided in § 3533 of this title, every person who knowingly and with malice prevents or dissuades (or who attempts to prevent or dissuade) any witness or victim from attending or giving testimony at any trial, proceeding or inquiry authorized by law is committing an act of intimidation and is guilty of a class E felony. A person who knowingly and with malice retaliates against any victim or witness who has attended or given testimony at any trial proceeding or inquiry authorized by law by committing any crime as defined by the laws of this State

witnesses pursuant to Superior Court Criminal Rule 42.1.³ Commissioner Danberg, Attorney General Biden and then Warden DeLoy were made aware of the “violations” and did nothing. Commissioner Danberg, Attorney General Biden and then Warden DeLoy, by doing nothing, are hindering the prosecution of defendants Sgt. Biles, C.O. Muniz, C.O. Rogers, C.O. West and

against such victim or witness is committing an act of intimidation and is guilty of a class E felony. A person who knowingly and with malice attempts to prevent another person who has been the victim of a crime, or a witness to a crime (or any person acting on behalf of a victim or witness) from:

- (1) Making any report of such crime or victimization to any peace officer, law-enforcement officer, prosecuting agency, probation officer, parole office, correctional officer, or judicial officer;
- (2) Causing a complaint, indictment, information, probation or parole violation to be sought or prosecuted, or from assisting the prosecution thereof; or
- (3) Arresting, causing or seeking the arrest of any person in connection with such crime or victimization;

Is guilty of a class E felony.

²In 11 *Del. C.* § 3533, it is provided as follows:

Every person doing any of the acts set forth in § 3532, of this title, knowingly and with malice under 1 or more of the following circumstances, shall be guilty of a class D felony if, in addition, such act:

- (1) Is accompanied by an express or implied threat of force or violence, upon a victim, a witness or any third person (or upon the property of a victim, a witness or third person);
- (2) Is in furtherance of a conspiracy;
- (3) Is committed by any person who has been convicted of any violation of this subchapter, any predecessor law hereto, the statute of any other state or any federal statute which would be a violation of this subchapter if committed in this State; or
- (4) Committed, for pecuniary gain or for any other consideration, by any person acting upon the request of another person.

³In Super. Ct. Crim. R. 42.1, it is provided: “The court shall protect ... witnesses pursuant to 11 *Del. C.* § 3535....

C.O. Burton and thus, are violating 11 *Del. C.* § 1244.⁴ Plaintiffs maintain they have the right to file charges against defendants based upon the constitution and that defendants were acting “under color of state law” when they violated plaintiffs’ rights.

3) Plaintiffs ask for the following relief:

a) That charges of intimidation of a witness, harassment and retaliation be filed against defendants Sgt. Barry, C.O. Muniz, C.O. West, and C.O. Burton;

b) That assault charges be filed against Sgt. Biles, C.O. Muniz and C.O. Rogers for their assault on Usef Dickerson;

c) That charges of hindering prosecution, failure to protect and do duty under the constitution; grossly negligent charges be filed against Commissioner Danberg, Attorney General

⁴In 11 *Del. C.* § 1244, it is provided:

(a) A person is guilty of hindering prosecution when, with intent to prevent, hinder or delay the discovery or apprehension of, or the lodging of a criminal charge against, a person whom the person accused of hindering prosecution knows has committed acts constituting a crime, or is being sought by law-enforcement officers for the commission of a crime, the person accused of hindering prosecution:

(1) Harbors or conceals the person; or

(2) Warns the person of impending discovery or apprehension; or

(3) Provides the person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or

(4) Prevents or obstructs, by means of force, intimidation or deception, anyone from performing an act which might aid in the discovery or apprehension of the person or in the lodging of a criminal charge against the person; or

(5) Suppresses, by an act of concealment, alteration or destruction, any physical evidence which might aid in the discovery or apprehension of the person or in the lodging of a criminal charge against the person; or

(6) Aids the person to protect or profit expeditiously from an advantage derived from the person's crime.

Biden, and defendant DeLoy;

d) That a preliminary injunction be entered against each defendant and that defendants Biles, Muniz, Burton, and Tim West stop harassing plaintiffs, stop staring at plaintiffs with “intimidation looks”; and that each defendant be moved from the medium building around plaintiffs;

e) That a temporary restraining order be issued against all defendants;

f) That a motion for injunction be granted and the Court direct the officials to allow plaintiffs to press charges against defendants and direct defendants to stop violating plaintiffs’ equal protection rights;

g) That a declaratory judgment be entered against defendants and that the Court explain to the defendants the legal rights and duties and obligations of the prison officials concerning plaintiffs’ rights to file charges and equal protection under the fourteenth amendment;

h) That the complaint be class certified and that plaintiffs be afforded counsel;

i) That each plaintiff be awarded in excess of \$100,000 from each defendant for punitive damages;

j) That a protective order be entered against each defendant; and

k) That the Court order such other relief as it deems just and proper.

4) Defendants have filed a motion to dismiss the complaint. Defendants have characterized the complaint as one seeking a writ of mandamus and argue plaintiffs fail to state a claim upon which relief may be granted.

5) Defendants noticed the motion to be heard on Friday, August 6, 2010. Plaintiffs were required to file a response by noon on Monday, August 2, 2010. Sussex County Civil Case

Management Plan, IV.1.C.2.⁵ They did not file a timely response. As of the date of this order, plaintiffs have failed to file a response to the motion, and thus, pursuant to the Superior Court Civil Case Management Plan, the motion to dismiss is deemed unopposed.

6) Even if the Court considered the motion to be opposed, it grants the motion. Because the petition is so clearly meritless, judicial economy requires its outright dismissal without a hearing.

7) First, plaintiffs may not seek injunctive relief, i.e., a temporary restraining order and/or injunction, because this Court lacks jurisdiction to grant such. *State v. Goodlett*, 2005 WL 2249759, *2 (Del. Super. Aug. 16, 2005). All requests for injunctive relief are dismissed.

8) Although plaintiffs never specifically request the issuance of a writ of mandamus, a review of the complaint indicates that may be the type of relief they are seeking, and the Court will view the complaint in a light most favorable to them. As explained below, to the extent plaintiffs seek a writ of mandamus, they have failed to show they are entitled to such.

The Superior Court recently reviewed the law regarding the issuance of a writ of mandamus in *Gattis v. Danberg*, 2009 WL 752680, *2 (Del. Super. March 19, 2009), *aff'd*, 976 A.2d 171 (Del. July 14, 2009):

7. The issuance of a mandamus falls within judicial discretion and is not a matter of right.FN10 This Court may issue a mandamus “to an inferior court, public official, or agency to compel the performance of a duty to which the petition has established a clear right.” FN11 Further, “when directed to an administrative agency or public official, mandamus will issue only to require performance of a

⁵Sussex County Civil Case Management Plan, IV.1.C.2., provides in pertinent part:

Response is due to the Court and opponent no later than 4 days prior to the hearing date. If no response is filed by the due date, the motion may be deemed unopposed.

clear legal or ministerial duty.” FN12 Thus, a mandamus will not be issued to compel a discretionary act.FN13 If a petitioner cannot show a clear right to the requested performance of a duty, or if there is any doubt as to a petitioner's right, a mandamus shall not be issued by this Court.FN14

FN10. *Guy v. Greenhouse*, 637 A.2d 287 (Del.1993).

FN11. *Clough v. State*, 686 A.2d 158, 159 (Del.1996).

FN12. *Guy*, 637 A.2d at 287 (citing *Capital Educ. Assoc. v. Camper*, 320 A.2d 782 (Del. Ch.1974)).

FN13. *Id.* (citing *Darby v. New Castle Gunning Bedford Educ. Assoc.*, 336 A.2d 209, 211 (Del.Super.Ct.1975) (holding that a statute which included the word “agreement” was a statute which intended discretion based on the very nature of the word “agreement .”)”); *Defore v. Williams*, 1999 WL 1442003, * 2 (Del.Super.Ct.) (noting that a prisoner has no right of mandamus to obtain copies of policies, grievance procedures or disciplinary rules since 11 Del. C. § 6535 places the discretion in the hands of the Commissioner of the appropriate time and place to allow copies of said documents.).

FN14. *In the matter of Michael J. Richardson*, 2002 WL 162291 (Del.Super.Ct.2002) (citing *State ex rel. Lyons v. McDowell*, 57 A.2d 94, 97 (Del.Super.Ct.1947)) (holding that a prisoner's right to possess personal items is not absolute and is subordinate to the safety of individuals within the prison.).

The decision as to whether to prosecute anyone on a criminal charge rests with the Attorney General and that decision is discretionary. *Seth v. State*, 592 A.2d 436, 439 (Del. 1991).

Thus, there is no basis for issuing a writ of mandamus to the Attorney General.

The DOC Commissioner and defendant DeLoy do not have the ability to criminally prosecute someone. Their decisions as to whether to relocate the prison guards is within their discretion. There is no non-discretionary action involved on their part. Thus, there is no basis for issuing a writ of mandamus with regard to them.

9) Plaintiffs also seek to state claims entitling them to monetary damages.

To the extent plaintiffs seek to state a private cause of action based upon the alleged violations of various criminal provisions, those claims fail as I conclude that there is no indication that the legislature intended to create a private cause of action based upon a violation

of the criminal statutes invoked and there is nothing to indicate that the legislature intended those statutes to be anything more than penal in nature. *Brett v. Berkowitz*, 1995 WL 270146 (Del. Super. April 13, 1995), *aff'd*, 706 A.2d 509 (Del. 1998).

To the extent plaintiffs argue violations of their constitutional rights, their claims fail. Conclusively asserting equal protection and due process violations is insufficient to state a claim. Nothing in the complaint can be read to state a claim for any violation of any constitutional rights.

10) Finally, with regards to Usef Dickerson, plaintiffs have no standing to assert claims on his behalf.

11) Plaintiffs have not stated any claims for relief. The complaint is legally meritless and must be dismissed.

IT IS SO ORDERED THIS 5th DAY OF AUGUST, 2010.

JUDGE

cc: Prothonotary's Office
Plaintiffs
Ophelia M. Waters, Esquire